Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

IN RE TERRY L. STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, AND GRANT WOODS, ARIZONA ATTORNEY GENERAL,
Petitioners.

COMBINED ALTERNATIVE PETITION FOR STATUTORY WRIT OF CERTIORARI OR FOR EXTRAORDINARY WRIT (MANDAMUS, PROHIBITION, OR COMMON LAW WRIT OF CERTIORARI) TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GRANT WOODS
ATTORNEY GENERAL

PAUL J. McMURDIE
CHIEF COUNSEL
CRIMINAL APPEALS SECTION

BRUCE M. FERG
ASSISTANT ATTORNEY GENERAL
(COUNSEL OF RECORD)
400 W. CONGRESS, BLDG. S-315
TUCSON, ARIZONA 85701-1367
TELEPHONE: (520) 628-6504

ATTORNEYS FOR PETITIONERS

61 pp

CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

The Ninth Circuit held that the 1996 Antiterrorism and Effective Death Penalty Act's limitations on second or successive habeas corpus petitions apply to all habeas proceedings (even "original" Supreme Court petitions), and that enforcing those limitations to preclude consideration of a claim of incompetency for execution would be a violation of the Suspension Clause of the Constitution. To avoid the constitutional problem, the Ninth Circuit construed competency for execution claims as being so unique that they are not subject to the Act's limitations. Each of these conclusions contradicts a direct or implicit holding of *In re Medina*, 109 F.3d 1556 (11th Cir.), *cert. denied*, 117 S. Ct. 1331 (1997). This circuit split raises the following questions:

1. Did Congress intend the Act's limitations on second or successive habeas corpus petitions to apply to all claims and in every court including competency for execution claims and applications for "original" Supreme Court habeas corpus writs?

2. Would applying the Act to prevent consideration of a claim of incompetency for execution, which is raised in a second or successive habeas corpus petition, constitute a violation of the Suspension Clause?

3. By what means can this Court review these issues?

PARTIES TO THE PROCEEDINGS BELOW

This Petition stems from a habeas corpus proceeding in which Petitioners here, Terry L. Stewart (Director of the Arizona Department of Corrections) and Grant Woods (Attorney General of the State of Arizona) were the respondents. That proceeding was initiated by Ramon Martinez-Villareal, a prisoner in the custody of Petitioner Stewart under sentence of death. Relief is sought against an order issued by a panel of judges of the Ninth Circuit Court of Appeals comprised of Judges Edward Leavy, Dorothy W. Nelson, and Thomas G. Nelson.

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OPINION BELOW

The opinion which is the subject of this Petition is not yet published; a copy is attached as Appendix A.

STATEMENT OF JURISDICTION

Petitioners respectfully request issuance of either a statutory writ of certiorari or an extraordinary writ (mandamus, prohibition, or common law writ of certiorari), to enable this Court to review the decision of the United States Court of Appeals for the Ninth Circuit in *Martinez-Villareal v. Stewart*, Nos. 97-80229 and 97-80249. The Ninth Circuit issued its decision on June 23, 1997. Petitioners have timely filed the petition for statutory writ of certiorari within 90 days of that decision. Petitioners contend that this Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. §§ 1254(1) and 1651(a); and Supreme Court Rules 10 and 20.1. Details concerning jurisdiction are addressed in Argument III.

Although the opinion below attempted to avoid the issue, the constitutionality of a portion of the Antiterrorism and Effective Death Penalty Act, 110 Stat. 1214 (codified as amendments to various portions of Chapter 153 of Title 28, United States Code), has definitely been "drawn into question," as a possible violation of the Suspension Clause, Article I, Section 9, Clause 2 of the Constitution. Neither the United States nor any person or agency connected with it were a party to the proceedings below. Therefore, in accordance with Supreme Court Rules 14.1(e)(v) and 29.4(b), notice is hereby given that 28 U.S.C. § 2403(b) may apply, so a copy of this Petition is being served upon the Solicitor General of the United States. To the knowledge of counsel for Petitioners, the court below did not certify to the Attorney General of the United States that the constitutionality of an Act of Congress was drawn into question, as required by 28 U.S.C. § 2403(a).

PROVISIONS INVOLVED

The Suspension Clause, Article I, Section 9, Clause 2, of the Constitution:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

28 U.S.C. § 1254:

> Cases in the courts of appeals may be reviewed by the Supreme Court . . . (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . .

28 U.S.C. § 1651(a):

> The Supreme Court . . . may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 2244 (as amended in 1996):

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole,

would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

A.R.S. §§ 13-4021 to -24. (*See* Appendix B.)

STATEMENT OF THE CASE

A. General Procedural History.

Ramon Martinez-Villareal was convicted of two murders and sentenced to death, based on two aggravating factors (depravity—he boasted to a traveling companion that he had killed the helpless victims merely to show how "manly" he was—and commission for pecuniary gain) that were not offset by any mitigation. The Arizona Supreme Court affirmed the convictions and sentences. *State v. Martinez-Villareal*, 145 Ariz. 441, 702 P.2d 670, *cert. denied*, 474 U.S. 975 (1985).

Beginning in 1986, Martinez-Villareal, represented by various attorneys, litigated several federal habeas corpus petitions and two state post-conviction ("Rule 32") petitions, obtaining stays of execution but no substantive relief in any of them. *Martinez-Villareal v. Arizona*, 493 U.S. 874 (1989) (denying certiorari in second Rule 32 proceeding). In 1990, the district court issued a stay of execution and appointed yet another attorney (Sean Bruner) to represent Martinez-Villareal. In 1991, Bruner suggested, for the first time, that Martinez-Villareal might be mentally incompetent to be executed, so the district court ordered the pending habeas petition dismissed without prejudice, allowing the matter to be litigated in the state courts.

Martinez-Villareal's third state post-conviction relief petition raised 31 claims, but the trial court summarily denied relief, ruling that all but three of the claims were precluded, and that those three raised nothing on which relief could be granted. The competency for execution claim was denied because it should not have been brought in a Rule 32 proceeding at all, but under a separate statute specifically dealing with such claims, A.R.S. §§ 13-4021 to -24. (*See* App. B.) The Arizona Supreme Court denied review and this Court denied certiorari. *Martinez-Villareal v. Arizona*, 506 U.S. 893 (1992).

Bruner then filed an amended habeas corpus petition, arguing most of the claims presented in the Rule 32 proceeding. The district court rejected most of the claims, but ordered that Martinez-Villareal be resentenced, on the basis that he had received ineffective representation during the original sentencing. The

district court left unresolved the issue of Martinez-Villareal's competency to be executed, holding that the claim was not "ripe" for decision—there was then no warrant for his execution and the claim had not been exhausted in the state courts, because no proceeding had ever been brought under the state's competency statute. On appeal, the Ninth Circuit vacated the resentencing order so that Martinez-Villareal was not granted relief of any kind. *Martinez-Villareal v. Lewis*, 80 F.3d 1301 (9th Cir.), *cert. denied*, 117 S. Ct. 588 (1996). The Ninth Circuit agreed to leave unresolved the competency issue, finding that the issue had been brought to the federal courts "premature[ly]" and specified that its order "to enter judgment denying the petition [was] not intended to affect any later litigation of that question." 80 F.3d at 1307 and 1309 n.1.

In early 1997, the defense finally filed a motion under the statute dealing with competency for execution, requesting a hearing. The Arizona Supreme Court issued an execution warrant for April 16, 1997, but reset the execution to May 21, 1997, to allow Martinez-Villareal more time to prepare for the hearing. Having heard 4 days of testimony, the trial judge concluded that, "Defendant is aware that he is to be punished for the crime of murder and [ ] he is aware that the impending punishment for that crime is death; that the Defendant, Ramon Martinez-Villareal is therefore competent to be executed under the laws of the State of Arizona." On May 16, 1997, the Arizona Supreme Court unanimously agreed that Martinez-Villareal is competent for execution and this Court denied certiorari. *Martinez-Villareal v. Arizona*, 117 S. Ct. 1840 (1997).

B. Development of the Successive Petition/Suspension Clause Issue.

On May 14, 1997, the Federal Public Defender's Office filed a motion requesting that the district court appoint experts to examine and test Martinez-Villareal, in anticipation of filing a "supplemented" habeas petition presenting the competency for execution issue. Petitioners argued that Martinez-Villareal was in effect initiating a successive petition, but that the permission from the court of appeals required by 28 U.S.C. § 2244(b)(3)(A), as amended by the 1996 Antiterrorism and Effective Death Penalty

Act ("Act"), had not been obtained, so that the district court lacked authority to grant the relief requested. On May 16, 1997, the district court denied Martinez-Villareal's request agreeing with Petitioners, and Martinez-Villareal appealed. Although it denied all other relief, the Ninth Circuit ordered that the execution be stayed and that further briefing be submitted concerning whether the Act's limitations on successive petitions, as applied to competency for execution claims, amounted to an unconstitutional suspension of the writ of habeas corpus. Petitioners' application to this Court to vacate the stay was denied. *Stewart v. Martinez-Villareal*, 117 S. Ct. 1840 (1997).

Following oral argument, the Ninth Circuit issued the opinion which is the subject of this Petition. Citing *Herrera v. Collins*, 506 U.S. 390, 406 (1993), the majority opinion pointed out that claims of incompetency for execution, which were first recognized as possessing a constitutional basis in *Ford v. Wainwright*, 477 U.S. 399 (1986), were to be "properly considered in proximity to the execution." (App. A, Slip Op. at 3.) Hence, when Martinez-Villareal first raised his competency claim in federal court, no execution warrant was operative, so the claim had not been addressed because of its prematurity. *Id.* at 3–4. However, the majority believed that, even if there had been an execution warrant pending at the time that Martinez-Villareal had first raised the competency claim in federal court, it still would have been premature, because of this Court's statement in *Lonchar v. Thomas*, ___ U.S. ___, 116 S. Ct. 1293, 1297 (1996), that, "if the district court cannot dismiss the [first habeas] petition on the merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the case from becoming moot." Thus, because a stay would necessarily have issued to permit federal court consideration of the rest of Martinez-Villareal's claims, and that stay would automatically have rendered the execution non-imminent, the competency claim would still have been premature and not open to consideration in the first habeas proceeding. *Id.*

The situation is further complicated by the passage of the 1996 Act. The majority below recognized that 28 U.S.C. § 2244, as amended, divides successive habeas petitions into just two categories: those raising claims that were presented in a previous

petition, and those raising claims that were not presented in a previous petition. Those in the first category are required, without exception, to be dismissed, while those in the second category will also be dismissed, unless they can pass through the narrow "gateway" exceptions permitted by § 2244(b)(2). *Id.* at 4–5. The first exception, subsection 2244(b)(2)(A), for claims relying on a new rule of constitutional law that was unavailable at the time of the applicant's first habeas petition, does not apply to Martinez-Villareal's competency for execution claim, because such claims have been available since *Ford v. Wainwright* was decided in 1986. The second exception, subsection 2244(b)(2)(B)(i) and (ii), involving newly discovered facts, also is unavailable in a situation like this one, because of the requirement that the new evidence be such as would establish that no reasonable factfinder "would have found the applicant guilty of the underlying offense." This limitation excludes all claims—including competency for execution—that go only to sentencing matters. *See Greenawalt v. Stewart*, 105 F.3d 1268, 1277 (9th Cir.), *cert. denied*, 117 S. Ct. 794 (1997); *In re Medina*, 109 F.3d 1556, 1564–65 (11th Cir.), *cert. denied*, 117 S. Ct. 1331 (1997). "It thus appears that the automatic stay accompanying a first habeas petition and the inapplicable gateways provided by the AEDPA foreclose any federal review of a death row inmate's competency to be executed." Slip Op. at 5.

The court of appeals believed that this situation created a "predicament" of constitutional proportions, in that the preclusion of habeas corpus review might amount to a violation of the Suspension Clause, United States Constitution, Article I, Section 9, Clause 2. *Id.* at 6. The majority opinion rejected the possibility of certiorari review by this Court as an adequate solution to the perceived problem because that is part of the direct review process, rather than a mode of plenary collateral review. *Id.* at 5–6 and n.3. It also found no solution in this Court's authority to issue "original" writs of habeas corpus because, contrary to the Eleventh Circuit's conclusion in *Medina*, 109 F.3d at 1564, it concluded that § 2244(b)'s restrictions on successive petitions apply to petitions initiated in this Court, as well as in the lower courts. Slip Op. at 6–8. To avoid the hypothesized "difficult constitutional question," the majority below effectively rewrote the Act, determining that, henceforth, competency for

execution claims will constitute a new category of successive claims, which will be *required* to be brought in multiple habeas petitions, but which, nonetheless, will not be precluded as successive, on the theory that bringing them initially when they are "premature" is the same as not having brought any cognizable prior petition at all. *Id.* at 9–14. Utilizing this transmogrified definition of a "successive" petition, the majority viewed the requirement that a court of appeals grant or deny permission for the filing of a successive petition to be completely inapplicable to competency for execution claims, so it simply transferred Martinez-Villareal's second habeas petition to the district court for further proceedings. *Id.* at 14. The third member of the court below, Judge T.G. Nelson, did not believe that the Suspension Clause issue could be avoided in the manner devised by the majority, and that the Act's restrictions on habeas review as applied to competency for execution claims like Martinez-Villareal's amounted to a violation of the Suspension Clause. However, he concurred in the result, because the transfer of the competency claim to the district court was a satisfactory resolution. *Id.* at 13–14.

REASONS WHY A WRIT SHOULD ISSUE

I

THE ACT'S RESTRICTIONS ON SUCCESSIVE HABEAS CORPUS PETITIONS APPLY TO ALL KINDS OF CLAIMS AND TO ALL COURTS.

The Ninth Circuit concluded that, if 28 U.S.C. § 2244(b)'s restrictions on second or successive habeas petitions (hereafter referred to as "successive petitions") apply to Martinez-Villareal's claim of incompetency for execution, it would constitute a violation of the Suspension Clause, so the court "construed" the Act to avoid the perceived constitutional problem. *Id.* at 3–8. This reconstruction of the statute can be justified only if the Act's restrictions apply to competency for execution claims, and apply to "original" habeas corpus petitions brought in this Court; otherwise, Martinez-Villareal suffers from no "predicament" which needs to be resolved, and the redrafting of the statute is patently erroneous. *Id.* at 3–8. The Ninth Circuit recognized that its view that the restrictions on successive habeas corpus petitions apply to

"original" habeas petitions in this Court directly contradicts the conclusion of the Eleventh Circuit in *In re Medina*, 109 F.3d at 1564. *Id.* at 6–7 and n.4. Hence, there now exists an intercircuit dispute regarding a major issue of statutory interpretation which only this Court can, and plainly should, resolve.

A. FACTORS FAVORING GRANTING OF REVIEW.

Among the "considerations governing review" set forth in Supreme Court Rule 10(a) is the fact that a conflict exists between federal courts of appeals "on the same important matter." This Court has stated that resolution of such conflicts is "[a] principal purpose for which we use our certiorari jurisdiction." *Braxton v. United States*, 500 U.S. 344, 347 (1991). Granting review is especially appropriate where, as here, the conflict is so plain that it is expressly noted by the court below. *See, e.g., United States v. Lorenzetti*, 467 U.S. 167, 173 (1984).

Review is also frequently granted where a lower court has decided an important question of federal law that should be settled by this Court. Rule 10(b). This includes issues of the construction and administration of important federal statutes. *See, e.g., United States v. An Article of Drug*, 394 U.S. 784 (1969) (lower court's interpretation of the congressional act raised issues of importance in the administration of federal statute); *American Federation of Musicians v. Wittstein*, 379 U.S. 171, 175 (1964) (involving an "important" question of "first impression" under the statute); *Kossick v. United Fruit Co.*, 365 U.S. 731, 733 (1961) (case "presented novel questions as to the interplay" of various laws). The proper interpretation of the habeas corpus amendments in the Act, which affect so large a portion of the workload of all the federal courts, certainly is an issue sufficiently important to warrant review. *See Felker v. Turpin*, ___ U.S. ___, 116 S. Ct. 2333, 2337, 105 L. Ed. 2d 827 (1996) (certiorari granted to consider application of some portions of the Act to this Court and possible Suspension Clause problem); *Lindh v. Murphy*, No. 95–8836, 61 Crim. L. Rep. 2176, 2177 (U.S. June 23, 1997) (certiorari granted to resolve circuit conflict over retroactivity of the Act). Thus, to resolve the circuit conflict and the important issues of interpretation of the Act presented by this case,

continuing the process begun but not completed in *Felker* and *Lindh*, this Court should grant review.

B. The Act's Restrictions on Successive Petitions Apply to Competency for Execution Claims, Even In "Original" Petitions.

There seems to be no dispute that the restrictions on successive habeas petitions contained in 28 U.S.C. § 2244(b) apply to competency for execution claims. Nothing in either the language of the statute or its legislative history indicates a Congressional intent to exempt such claims from the universal language of the restrictions on successive petitions, and both the Eleventh and the Ninth Circuits agree that the restrictions apply to competency for execution claims. *In re Medina*, 109 F.3d at 1564–65; Appendix A, Slip Op. at 4–5.[1]

The two Circuits diverge, however, regarding the results of applying the Act's restrictions to competency for execution claims. *Medina* saw no problem in precluding district court habeas consideration, because of its view that an inmate can obtain adequate federal review by means of a certiorari petition or an unrestricted original habeas corpus petition to this Court. 109 F.3d at 1564. The Ninth Circuit, by contrast, sees the Act's restrictions on successive habeas petitions as applying even to original petitions to this Court, and certiorari from the state court proceeding as inadequate, because it is not a form of plenary collateral review. (App. A, Slip Op. at 5–7 and nn.3, 4.) This perceived lack of adequate federal court collateral review motivated the Ninth Circuit to reconstruct the statute, to avoid the supposed Suspension Clause problem. *Id.* at 9–12. Hence, to determine whether the Ninth Circuit's manipulation of the statute is warranted, this Court must first agree (contrary to the Eleventh

1. In its opinion the Ninth Circuit did vaguely "question whether the successive petition and abuse of the writ doctrines even apply to competency claims." (App. A, Slip Op. at 11 n.7.) However, the cases which it cites predate the Act and merely allude to the issue, without making an actual ruling. Thus, the whole area, particularly as viewed in the new light cast by the Act, has no meaningful precedent, which is itself a factor warranting review.

Circuit) that its jurisdiction to issue original writs of habeas corpus is subject to the Act's restrictions on successive petitions.

This question was touched upon, but not decided, in *Felker v. Turpin*. The time has come to resolve it, and Petitioners contend that the Act's restrictions *do* apply to such original petitions.[2] This Court has agreed since the time of Chief Justice Marshall that "power to award the writ by any of the courts of the United States must be given by written law." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807). The statutory authority known to him, Section 14 of the Judiciary Act of 1789, "is the direct ancestor of 28 U.S.C. § 2241," the single source from which all federal courts derive their authority to issue writs of habeas corpus. *Felker*, 116 S. Ct. at 2338 and n.1. All of Chapter 153 of Title 28 of the United States Code must be read together, with § 2241 being the grant of authority to issue writs, and the rest of the chapter providing the standards and procedures to be employed in the exercise of that authority. Many of the individual sections within that chapter specifically refer to both this Court (or its individual justices) and the lower federal courts, without drawing any distinction between them, except as required by their relative positions. See 28 U.S.C. §§ 2241(a) and (b), 2242, 2243, 2251, and 2254(a). Conspicuously absent is any differentiation between the standards and procedures to be employed by this Court and other federal courts. Chief Justice Rehnquist has referred, collectively, to "the statutes governing habeas corpus, 28 U.S.C. § 2241–2255." *Lonchar v. Thomas*, 116 S. Ct. at 1304 (concurring opinion). Similarly, *Lindh v. Murphy* refers to the Act as "amend[ing] § 2244 and §§ 2253–55 of chapter 153 . . . governing *all habeas corpus proceedings in the federal courts*." 61 Crim. L. Rep. at 2177 (emphasis added). Thus, no authority exists for this Court to issue original writs separate from the authority granted to the lower federal courts, necessitating the conclusion that this Court is subject to the same restrictions imposed on the lower federal courts.

2. Petitioners' position below (relying upon *Medina)* was that the restrictions do not apply to this Court. Reconsideration of the matter in light of the Ninth Circuit's analysis has persuaded Petitioners that the restrictions of the Act do apply to original petitions filed with this Court.

In addition to the long-standing structure of the statutes, the language of the amendments wrought by the Act demonstrates that they were intended to apply to *all* habeas proceedings, including those originating in this Court. As noted in *Felker*, the "gatekeeping" provision of the Act, now codified as § 2244(b)(3), obviously cannot apply to this Court, because it is specifically directed at applications "filed in the district court." 116 S. Ct. at 2339. However, the other restrictions on successive petitions, which are at issue here, § 2244(b)(1) and (2), "apply without qualification to any 'second or successive habeas corpus application under section 2254.'" *Id.* As the Ninth Circuit observed, "If § 2244(b)(3) does not apply to the Supreme Court because it is expressly limited to petitions filed in the district court, then §§ 2241(b)(1) and (2) should apply to the Supreme Court because they are not similarly limited." (App. A, Slip Op. at 6.)

It therefore is clear that a conflict exists among the circuits concerning a substantial question, which only this Court can answer, and the answer is that the Act's restrictions on successive habeas petitions apply to original petitions in this Court.[3] Answering that question and resolving the conflict are themselves reason enough to take this case, but other significant issues here further militate in favor of granting a writ. Although Petitioners believe that the Ninth Circuit was correct about the applicability of the Act's restrictions on successive petitions to this Court, the court of appeals was wrong in every other aspect of its decision, as shown below.

. . . .

. . . .

3. Of course, should this Court nonetheless rule that the Act's restrictions on successive petitions do *not* apply to original petitions filed with it, then the Suspension Clause problem disappears even under the Ninth Circuit's analysis, and Martinez-Villareal is ineligible for district court consideration of his claim.

II

NO SUSPENSION CLAUSE VIOLATION RESULTS FROM THE ACT'S RESTRICTIONS ON SUCCESSIVE PETITIONS, SO THE NINTH CIRCUIT ERRED IN RECONSTRUCTING THE STATUTE TO AVOID THE NONEXISTENT VIOLATION.

The premise underlying the court of appeals' handling of this case, though expressed only obliquely, is nonetheless quite clear: every criminal defendant *always* has a right to have at least one *federal court* conduct plenary *collateral review* of constitutionally-based claims. Thus, once it determined that the Act's restrictions on successive petitions apply to original habeas proceedings in this Court, it looked for alternative modes of plenary federal collateral review. Rejecting another aspect of the Eleventh Circuit's *Medina* analysis, it deemed a certiorari petition from the state court competency proceeding not "an adequate alternative form of collateral relief." (App. A, Slip Op. at 5–6 n.3.) This led to the erroneous statements that "the inapplicable gateways provided by the AEDPA foreclose *any* federal review of a death row inmate's competency to be executed," and, "If we are correct, then a state prisoner's competency claim can *never* be heard by *any* federal court." (*Id.* at 5 and 8, emphasis added.) The statements are wrong because such claims *can* be heard in a federal court, though by way of certiorari rather than by habeas corpus.

Because the perceived foreclosure of habeas was considered a likely Suspension Clause violation, and because the court of appeals believed that it had "to ensure that a petitioner's federal claims are accorded one hearing in federal court," the majority below relied on one of its own prior opinions and held that a successive competency for execution claim should be treated as not successive, to avoid triggering the Act's restrictions. *Id.* at 8–12 (discussing *In re Turner*, 101 F.3d 1323 (9th Cir. 1996)). *Turner* treated as non-successive a second petition where the first petition had been dismissed in its entirety without prejudice for failure to exhaust state remedies. The concurring judge did not believe that *Turner* could be stretched to cover the different facts of this case, but agreed that inmates' loss of the "opportunity to present all their federal claims in federal court" by means of habeas corpus,

because of the Act's restrictions on successive petitions, constituted a Suspension Clause violation. (App. A, Concurring Opinion at 13–14.) Thus, all three judges below agreed that applying the restrictions on successive petitions to competency for execution claims likely would be unconstitutional, necessitating some remedy.

The fatal flaw in this reasoning is obvious: unless there actually is a constitutional entitlement to federal collateral review of all constitutional claims arising out of state criminal proceedings, to preclude consideration of a competency claim presented in a successive petition deprives an inmate of no legal right and requires no remedy. The only source posited for such an entitlement is the Suspension Clause. As shown below, the Suspension Clause is not violated by applying the Act here, so this Court should grant review, to explain the proper ambit of the Suspension Clause, to provide a correct understanding of the Act's restrictions on successive petitions, and to correct the Ninth Circuit's errors.

A. The Constitutional Issue Cannot Be Avoided.

The majority below exempted Martinez-Villareal from the Act's restrictions on successive petitions through a transparent exercise in circular reasoning. Citing a statement in *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988), that, "Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress," the court of appeals briefly indicated why it believed there might be a Suspension Clause problem; then, under the guise of "construing the statute," it created a remedy for the perceived problem by effectively rewriting the Act to include three categories of successive claims (those raised before, those not raised before, and those raisable regardless of whether they had been raised before because the court views them as unique) instead of the two which Congress created. However, nowhere to be found is any discussion of the language of the statute or the legislative history, by which Congressional intent ordinarily is ascertained; instead, the court of appeals simply redrafted the statute to fit its perception

of good policy in habeas proceedings. Thus, the court of appeals created a remedy for a *presumed* Suspension Clause violation, to avoid having to determine the existence of an *actual* Suspension Clause violation, although only the existence of an *actual* violation would permit the statutory manipulation in which the court of appeals engaged.

The principle restated in *DeBartolo*, which is frequently associated with the decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979), cannot justify such judicial sleight of hand. "[T]his canon of construction does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication . . ." *Commodity Futures Trading Com'n v. Schor*, 478 U.S. 833, 841 (1986). "[A] constitutional question confronted in order to preserve, if possible, a congressional enactment is not a constitutional question confronted unnecessarily." *Edmond v. United States*, ___ U.S. ___, 117 S. Ct. 1573, 1578 (1997).

> [T]he fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do. "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." Nor is the Judiciary licensed to attempt to soften the clear import of Congress' chosen words whenever a court believes those words lead to a harsh result. . . . When . . . nothing in the legislative history remotely suggests a congressional intent contrary to Congress' chosen words . . . any further steps take the courts out of the realm of interpretation and place them in the domain of legislation. . . . We cannot press statutory construction "to the point of disingenuous evasion" even to avoid a constitutional question.

United States v. Locke, 471 U.S. 84, 95–96 (1985) (citations omitted).

> A restrictive interpretation should not be given a statute merely because Congress has chosen to depart from custom or because giving effect to the express language

> employed by Congress might require a court to face a constitutional question.

United States v. Sullivan, 332 U.S. 698, 693 (1948) (rejecting narrowing construction of statute by court of appeals because it "rested not so much upon its language as upon the Circuit Court's view of the consequences that might result from the broader interpretation urged by the Government"). Thus, where the Congressional intent in the statute is clear, "that finding renders the preference for avoiding a constitutional question inapplicable." *Seminole Tribe of Florida v. Florida*, ___ U.S. ___, 116 S. Ct. 1114, 1124 n.9 (1996); *see also Swain v. Pressley*, 430 U.S. 372, 378 (1977) (clarity of District of Columbia Code provision claimed to violate Suspension Clause did not permit use of statutory construction to avoid the constitutional issue).

Section 2244(b)'s restrictions on all successive habeas corpus petitions are clear and brook no "interpretation" which magically creates a class of non-successive successive petitions exempt from those limitations. The clarity of the statutory language permits no evasion of the constitutional question. Therefore, unless this Court is content to let the Ninth Circuit set up shop for the practice of judicial legislation, it should grant review and consider the Suspension Clause problem—which, as next discussed, is not a particularly difficult issue.

B. There Has Been No Suspension Clause Violation Because What the Clause Protects is Not Modern Statutory Habeas Corpus.

In order to determine whether the Suspension Clause has been violated, it is obviously necessary to know what it is that the Clause protects. The court of appeals assumed that the Clause refers to the writ of habeas corpus as it exists today, rather than what existed in 1789, because that was the assumption made by *Felker v. Turpin*, 116 S. Ct. at 2340. (App. A, Slip Op. at 5–6 n.3.) However, *Felker* cited Chief Justice Burger's concurring opinion in *Swain v. Pressley*, 430 U.S. at 385, which expressly adopted the view that, "The sweep of the Suspension Clause must be measured by reference to the intention of the Framers and their understanding of what the writ of habeas corpus meant at the time the Constitution was drafted," rather than the writ as it has been

statutorily expanded and interpreted by this Court. In both *Swain* and *Felker* it was held that even the expansive modern writ had not been "suspended," so it is clear that neither of those cases decided the true purview of the Suspension Clause. Here, by contrast, a determination of the true scope of the Suspension Clause cannot be avoided, because the plain wording of the Act leaves no room for legitimate statutory "construction."

This is not to say, however, that this Court has never expressed itself on the subject; on the contrary, it has indicated rather plainly that Chief Justice Burger's view is correct. Responding to a claim that the Suspension Clause was violated by a statute that limited availability of transcripts for use in federal habeas proceedings, this Court said:

> This argument presupposes, *inter alia*, that a right to a free transcript is a necessary concomitant of the writ which the Founders declared could not be suspended. This is obviously not the case. The writ of habeas corpus operated until 1944 with no provision for free transcripts for indigents. Congress, when in that year it authorized free transcripts for the first time, could certainly have limited the authorization to nonfrivolous cases where a need had been shown. If Congress could have thus limited the writ directly without "suspending" it, it follows that it may do so indirectly.

United States v. MacCollom, 426 U.S. 317, 322–23 (1976). *See also Schneckloth v. Bustamonte*, 412 U.S. 218, 252–56 (1973) (Powell, J., concurring demonstrates historical errors in previous cases and that the Suspension Clause is properly understood to apply to habeas corpus only as it existed in 1789); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 170 (1970) ("It can scarcely be doubted that the writ protected by the suspension clause is the writ as known to the framers, not as Congress may have chosen to expand it or, more pertinently, as the Supreme Court has interpreted what Congress did."). It therefore appears that this Court has already determined the proper scope of the Suspension Clause to be only that which it protected at the time of its adoption, but that the Ninth Circuit (and undoubtedly many others as well) are still

laboring under the erroneous "revisionist view of the historic function that [habeas corpus] writ was meant to perform" (*Schneckloth v. Bustamonte*, 412 U.S. at 252), which Justice Powell debunked more than 25 years ago. Such error cries out for correction by this Court.

Proper analysis leaves no doubt that the scheme of habeas corpus modified by the Act is a purely statutory creature, separate and apart from the writ of habeas corpus contemplated by the Suspension Clause. Thus, Congress was free to restrict or even abolish it without violating the Suspension Clause. That Clause provides that "the privilege of the writ of habeas corpus shall not be suspended." However, no definition is provided for the critical terms. Chief Justice Marshall examined the English common law to determine the meaning of habeas corpus as used in the Clause and in the concurrently passed Judiciary Act of 1789. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807). "In the early decades of our new federal system, English common law defined the substantive scope of the writ." *McCleskey v. Zant*, 499 U.S. 467, 478 (1991) (citing *Ex parte Watkins*, 3 Pet. 193, 201–03, 7 L. Ed. 650 (1830)). Therefore, to understand what the "habeas corpus" is that is being protected by the Clause, it is necessary to understand that common-law background.

An excellent historical analysis is provided by Rex A. Collings, Jr., *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CAL. L. REV. 335 (1952) (hereafter "Collings"). Tracing English development of the writ until 1789 (*id.* at 336–38), Collings concludes:

> [A] person in custody for a crime had the immediate right either to be charged or released. If the crime charged was a misdemeanor there was a right to bail. Once properly charged with treason or a felony the only right was to a trial during the next session, which the Crown might delay. *Once convicted of a crime there was no privilege of the writ.*

Id. at 338, emphasis added.

Collings then surveys the English experience with "suspension" of the writ, which, of course, only related to *pretrial* curtailments

of liberty, because that was the extent of the common-law writ (*id.* at 339–40), and states:

> In other words, suspension in England was a legislative enactment which caused the Habeas Corpus Act to cease to operate, allowing confinement without bail, indictment, or other judicial process. *The end result was to deny the right to trial by jury.*

Id. at 340, emphasis added. "Suspension" operated similarly on those occasions in which it occurred in America. "Certainly nowhere is there any hint that it would be suspension to postpone the right of a convicted prisoner to habeas corpus. Suspension statutes were aimed at suspects, never at convicts." *Id.* at 340–41.

Records of the Constitutional Convention and the debates concerning adoption show that there was no belief that the Constitution was establishing a new right to habeas corpus in the Suspension Clause, but rather that Congress was being restrained from suspending the existing common-law writ; no right to habeas was proposed for inclusion in the Bill of Rights. *Id.* at 341–45.

> [N]othing in the history suggests that it was ever thought to be suspension of the writ to deprive convicts of its use. It seems altogether unlikely that the First Congress viewed the habeas corpus clause as establishing an affirmative right to the privilege of the writ. If they had so viewed the clause, why did they think it necessary in the Judiciary Act of 1789 to affirmatively give the federal courts jurisdiction to issue the writ? *One is driven to the conclusion that under our constitution, at least as it was understood in 1789, there was no right on the part of convicted prisoners to the privilege of habeas corpus. Such a right, if it was to exist at all, would have to come from Congress.*

Id. at 345, emphasis added. *See also Ex parte Watkins*, 3 Pet. at 202–03 (this Court followed the English Habeas Corpus Act of 1679, which expressly excepted from its coverage "persons convicted or in execution").

Not only is it plain that habeas corpus did not extend to convicted persons at all, but it is equally clear that it did not afford any protection to persons in *state* custody. Section 14 of the Judiciary Act of 1789, 1 Stat. 82, expressly limited the reach of habeas relief to prisoners in custody "under or by colour of the authority of the United States." This statute was enacted by a Congress that included many of the drafters of the Constitution, and it is inconceivable that such a group would have passed anything it perceived as limiting or violating so dear a right as habeas corpus. The necessary conclusion is that excluding state prisoners from habeas protection was *not* a violation of the Constitution, as understood by its own drafters.

> [E]arly congressional enactments "provid[e] 'contemporaneous and weighty evidence' of the Constitution's meaning." Indeed, such "contemporaneous legislative exposition of the Constitution . . . , acquiesced in for a long term of years, fixes the construction to be given its provisions."

Printz v. United States, No. 95-1478, 61 Crim. L. Rep. 2250, 2251 (U.S. June 27, 1997) (citations omitted).

That the Judiciary Act's preclusion of state prisoner access to habeas relief effectively deprived the federal courts of jurisdiction was acknowledged by *Ex parte Dorr*, 44 U.S. (3 How.) 103, 105 (1845). Other than a few extremely narrow situations (established by statute), no right of habeas for state prisoners existed until passage of the Act of Feb. 5, 1867, ch. 28, 14 Stat. 385. *Felker v. Turpin*, 116 S. Ct. at 2338. "*Congress* has expanded the rights of a petitioner for habeas corpus and the 'effect is to substitute for the bare legal review that seems to have been the limit of judicial authority under the common-law practice . . . a more searching investigation . . .'" *Johnson v. Zerbst*, 304 U.S. 458, 466 (1938) (emphasis added).

What Congress bestows out of legislative grace it may also limit, regulate, or take away. *See Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868) (when Congress repealed an appellate jurisdictional provision, this Court acknowledged that, absent that statutory authority, it had no jurisdiction over the case); *Whitney v. Dick*, 202 U.S. 132 (1906) (courts of appeals precluded from

issuing writs), and *Ahrens v. Clark*, 335 U.S. 188 (1948) (limiting territorially district court authority to issue the writ). This Court vowed to enforce "the 1966 amendments embodied in § 2254(d) [that] were intended by Congress as limitations on the exercise of that [statutory habeas] jurisdiction." *Sumner v. Mata*, 449 U.S. 539, 547 n.2 (1981). Most recently, this Court in *Felker v. Turpin*, upheld the limits on successive petitions found in this very Act.

> Seemingly there is no constitutional objection in failing to make provision for habeas corpus, or even in abrogating it altogether as to particular persons or classes of persons. . . . These illustrations make it clear that an abrogation of the writ in certain cases is not unconstitutional. Surely then when Congress increases the availability of the writ, only to find abuse, it can take corrective measures.

Collings at 359–61 (citing cases).

There is no violation of the Suspension Clause in applying the Act to foreclose a successive petition by Martinez-Villareal. The Clause is only violated when the writ is restricted to a narrower compass than it enjoyed when the Clause was drafted. The writ protected by the Suspension Clause extended neither to convicts of any sort, nor to persons held under state (as opposed to federal) authority. In the debates concerning the Act, members of both houses repeatedly voiced understanding of the distinction between the modern, statutorily-created habeas writ and the "Great Writ" which is protected by the Suspension Clause. 141 Cong. Rec. H1402, H1408, H1410 (daily ed. Feb. 8, 1995);[4] S7836, S7841 (daily ed. June 7, 1995); S3447 (daily ed. April 17, 1996). Thus, Congress' intent to do only what was constitutionally permissible for it to do—modify the *statutory* writ of habeas corpus it had created in 1867, while leaving the Constitutionally-protected "Great Writ" untouched—is certain.

4. Indeed, one congressman quoted the Powell Commission Report's statement that the Constitution "does not provide for federal habeas corpus review of state court decisions." 141 Cong. Rec. H1415 (daily ed. Feb. 8, 1995).

There having been no petitions available at all for persons like Martinez-Villareal in 1789, the Act's partial return to a jurisprudential state of affairs more closely resembling that which prevailed at the time of the Founders cannot reasonably be deemed a "suspension" of the writ. Because it is plain that the Act's restrictions on successive petitions do not violate the Suspension Clause, the court of appeals' decision collapses—no violation means no grounds for redrafting the statute and no basis for either transferring Martinez-Villareal's successive petition to the district court or an order permitting it to be filed.[5]

5. It should be noted that permitting federal review of a claim of incompetency for execution solely by means of a petition for certiorari to this Court works no prejudice to the inmate because, even apart from the restrictions on both first and successive petitions created by the Act, the scope of review available is extremely narrow, almost to the vanishing point. Competency determinations are factual matters, based largely on assessment of demeanor and credibility, so that the trial judge's conclusions must be accepted if supported by the record. *Demosthenes v. Baal*, 495 U.S. 731, 735 (1990); *Miller v. Fenton*, 474 U.S. 104, 112–17 (1985); *Maggio v. Fulford*, 462 U.S. 111, 116–18 (1983). Although not specifically stating it in those terms, it is evident that all of the opinions in *Ford v. Wainwright* contemplated that that standard of review would apply to competency for execution, as demonstrated by their discussions of whether the competency finding made there would receive the deferential treatment normally accorded state court findings of fact.

Federal cases applying *Ford* have consistently treated state court determinations of competency for execution as issues of fact, to be deferred to if supported by the evidence. *See, e.g., Weeks v. Jones*, 52 F.3d 1559, 1562 (11th Cir.), *cert. denied*, 115 S. Ct. 1841 (1995); *Shaw v. Armontrout*, 900 F.2d 123, 126 (8th Cir. 1990); *Graham v. Lynaugh*, 854 F.2d 715, 720–21 (5th Cir. 1988). The same would be true whether the claim was made in this Court by means of a certiorari petition or in the district court by means of a habeas petition, and where (as here) the state court conducted a meaningful evidentiary hearing on the claim, there simply would be no grounds for relief (something tacitly acknowledged by Martinez-Villareal's certiorari petition from his competency hearing, which raised only a feeble claim about Arizona's statute governing competency hearings and never challenged the trial court's and the Arizona Supreme Court's factual determination of competency). In short, inmates like Martinez-Villareal could not receive anything more from the eliminated district court review than from the review via certiorari, which still is available, so they will suffer no prejudice because of the Act.

III

REGARDLESS OF HOW THE COURT DETERMINES THE MERITS OF THE CLAIMS PRESENTED BY THIS PETITION, THE COURT POSSESSES JURISDICTION OVER THOSE CLAIMS.

A. Propriety of Relying on Multiple Jurisdictional Bases.

The appropriate basis for the Court's jurisdiction in this case is a somewhat unusual question, because it is bound up with the merits of the case. This matter reached the Ninth Circuit through a motion requesting permission to file a successive petition, as required by 28 U.S.C. § 2244(b)(3)(A). Section 2244(b)(3)(E) forbids review of rulings on such motions by either rehearing or certiorari, which suggests that Petitioners cannot approach this Court by certiorari, and can receive relief only by means of a writ under 28 U.S.C. § 1651(a). However, the Ninth Circuit refused to apply the Act and avoided its constraints on successive habeas petitions by creating a special category of "non-successive" successive petitions. If the Act and its preclusion of review do not apply here, then ordinary certiorari is available—but Petitioners' position is that the Ninth Circuit is wrong in its interpretation of the Act, so that if Petitioners approach this Court only by means of statutory certiorari, and persuade the Court that the Ninth Circuit erred in not applying the Act, they might find that they have "won" on the merits while simultaneously losing their remedy, by persuading the Court that it lacks jurisdiction to hear the case.

To avoid the possibility of being thus put out of court by the failure to know in advance how the substantive issues will be analyzed, Petitioners are bringing this combined Petition, relying on both ordinary statutory certiorari (28 U.S.C. § 1254(1)) and the various forms of relief permitted under the All Writs Act (28 U.S.C. § 1651(a)), including "common law" certiorari, prohibition, and mandamus. Multiple jurisdictional bases were utilized in *Felker v. Turpin*, where a similar issue of the Act's relation to the Suspension Clause came to this Court through a combined petition for writ of certiorari and "original" writ of habeas corpus, after the court of appeals had denied permission for

the filing of a successive petition. Analogously, this Court simultaneously entertained variously-framed petitions, brought by different parties but all raising the same issue of statutory construction, in *Ex parte Collett*, 337 U.S. 55, 57 (1949) (mandamus and prohibition), *Kilpatrick v. Texas & Pacific Ry. Co.*, 337 U.S. 75, 77 (1949) ("petition for a writ of certiorari or a writ of mandamus or any appropriate relief"), and *United States v. National City Lines, Inc.*, 337 U.S. 78, 80 (1949) (certiorari). This Court's willingness to consider all of these differently-labeled petitions seems to indicate that, where there is doubt about the appropriate vehicle by which to present an important statutory or constitutional issue, providing a variety of options, so that the procedural niceties of any particular mechanism do not prevent review, is acceptable to the Court. See R. Stern et al., Supreme Court Practice at 493–94 and n.5 (7th ed. 1996). Therefore, while Petitioners discuss below what appear to be the relevant jurisdictional concerns, this Court is urged to employ whatever procedural option it prefers to reach the merits of this Petition.

B. "Statutory" Certiorari Under 28 U.S.C. § 1254(1).

This most common mode of review is permissible upon "petition of any party to any civil or criminal case, before or after rendition of judgment or decree" regarding cases in the courts of appeals. The potential obstacle to employing this writ in this case is 28 U.S.C. § 2244(b)(3)(E), which states, "The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." If this provision applies to the decision made in this case, then this Court apparently would have to resort to one of its "extraordinary writs" in order to consider the matter. However, Petitioners contend that this mode of review *is* available, because of the nature of the ruling actually made by the Ninth Circuit and because of the language of the review-prohibiting provision, so that it will not be necessary to utilize the All Writs Act to review this case.

The prohibition on review applies only to, "The grant or denial of an authorization by a court of appeals to file a second or successive application . . ." However, the Ninth Circuit neither granted nor denied authorization for the filing of a second or

successive petition. Instead, it concluded that, "Martinez-Villareal's competency claim *is not subject to the restrictions imposed by § 2244(b)*. Therefore, *we dismiss as unnecessary* Martinez-Villareal's motion for authorization to file a petition for writ of habeas corpus in the district court." (App. A, Slip Op. at 11–12, emphasis added.) Thus, the issue before this Court simply is not one to which the terms of the prohibition of review apply—the real question here is whether the court of appeals was correct that "the restrictions imposed by § 2244(b)" can legitimately be construed so as not to apply to competency for execution claims, and only if *that* decision is reversed will any court actually determine whether authorization should be granted for the filing of a second petition by Martinez-Villareal. Hence, the prohibition of review should be found not to apply here.

That this is the proper approach is demonstrated by this Court's handling of prior cases involving similar restrictions on review. In *Johnson v. Robison*, 415 U.S. 361 (1974), a suit concerning denial of veterans' benefits to conscientious objectors who had completed alternative civilian service, the obstacle was 38 U.S.C. § 211(a), which stated that "the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration . . . shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise." However, this Court determined that it possessed jurisdiction to review the constitutional issues presented by the case:

> The prohibitions would appear to be aimed at review only of those decisions of law or fact that arise in the *administration* by the Veterans' Administration of a *statute* providing benefits for veterans. A decision of law or fact "under" a statute is made by the Administrator in the interpretation or application of a particular provision of the statute to a particular set of facts[;] Appellee's constitutional challenge is not to any such decision of the *Administrator*, but rather to a decision of *Congress* to create a statutory class entitled to benefits that does not include I-O conscientious objectors who performed alternative civilian service. Thus, as the District Court

> stated: "The questions of law presented in these proceedings arise under the Constitution, not under the statute whose validity is challenged." 352 F. Supp. at 853.

415 U.S. at 367 (emphasis in original).

A comparable issue arose in *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), which concerned administration of an amnesty program for illegal aliens employed in agricultural work ("SAW's"). The statute prohibited judicial review of administrative denial of SAW status except in relation to an order of exclusion or deportation, which meant that there would be no review at all unless a deportation proceeding happened to be initiated against an unsuccessful SAW applicant. The Court nonetheless found that it possessed jurisdiction to determine the validity of the statute:

> The critical words in [the statute], however, describe the provision as referring only to review "of *a determination* respecting *an application*" for SAW status (emphasis added). Significantly, the reference to "a determination" describes a single act rather than a group of decisions or a practice or procedure employed in making decisions. Moreover, when § 210(e)(3), see 8 U.S.C. § 1160(e)(3), further clarifies that the only judicial review permitted is in the context of a deportation proceeding, it refers to "judicial review of *such a denial*"—again referring to a single act, and again making clear that the earlier reference to "a determination respecting an application" describes the denial of an individual application. We therefore agree with the District Court's and the Court of Appeals' reading of this language as describing the process of direct review of individual denials of SAW status, *rather than as referring to general collateral challenges to unconstitutional practices and policies used by the agency in processing applications*.

498 U.S. at 492 (final emphasis added).

Similarly, the issues here are the proper construction of the Act (*i.e.*, whether it should be understood to apply to the *class* of

claims of incompetency for execution presented in successive habeas petitions), and the constitutionality of the Act (*i.e.*, whether it violates the Suspension Clause, if it does apply to successive petitions bringing claims of incompetency for execution), rather than an individual determination *under* the Act about whether to grant authorization for a particular successive petition. Therefore, *Johnson* and *McNary* show that the prohibition on review contained in 28 U.S.C. § 2244(b)(3)(E) does not apply to the questions raised by this case, and that this Court can exercise review by means of "statutory" certiorari, just as it did in *Felker*.

C. Jurisdiction Pursuant to the All Writs Act, 28 U.S.C. § 1651(a), and Supreme Court Rule 20.

The types of writs available under the statute have been summarized as follows:

> In general, the writ of mandamus is sought to compel a lower court to do something it has refused to do, and the writ of prohibition to prohibit it from doing something it otherwise will do. But since almost any issue may be phrased either affirmatively or negatively, these writs are often used interchangeably; frequently, indeed, counsel request both "mandamus and prohibition" to play it safe. The writ of certiorari under § 1651 orders the lower court to certify the record to the Supreme Court. This rarely used writ has been used to bring before the Court for review, in exceptional circumstances, otherwise non-appealable orders. It "is not the statutory writ of certiorari" but instead "a kind of reserve power, preserved by the 'all-writs' section, 28 U.S.C. § 1651(a), and available for use in exceptional cases."
>
> Although the several writs to some extent serve different functions, they overlap considerably, and the same general principles guide the Court in determining whether to allow each of them.

Stern et al. at 493–94 (citations omitted).

This case demonstrates the truth of these comments: we have exceptional circumstances involving an arguably non-appealable

order; Petitioners desire the district court to be prohibited from entertaining Martinez-Villareal's successive habeas petition; but the occasion for the problem is the court of appeals' usurpation of judicial power, by imposing on the Act an interpretation it will not bear so that it supposedly allows Martinez-Villareal to file a successive petition. Therefore, Petitioners are requesting this Court to utilize such of the writs as it deems proper to remedy the court of appeals' error.

Section 1651(a), as explicated by Supreme Court Rule 20, requires that for the extraordinary writs to issue: (1) such action must be in aid of this Court's appellate jurisdiction; (2) exceptional circumstances must exist that warrant the exercise of this Court's discretionary powers; and (3) adequate relief cannot be obtained in any other form or from any other court. All of these somewhat overlapping considerations are present in this case.

If this Court is considering this portion of the Petition, this Court will have necessarily determined that the "statutory" writ of certiorari is not available, presumably because of 28 U.S.C. § 2244(b)(3)(E)'s prohibition of review of determinations concerning authorization for successive habeas petitions. Implicit in such a determination is a positive response to the three conditions for issuance of a writ pursuant to Rule 20. First, if further review of the Ninth Circuit panel's decision is statutorily foreclosed, then adequate relief obviously is unavailable from any other source. The prohibition includes motions for rehearing, so Petitioners cannot obtain relief either from the panel or the *en banc* court of appeals. The prohibition also precludes certiorari, so no form of relief other than one of these writs appears to be available. No court but this one has authority to revise the action of a federal court of appeals. Thus, the third requirement is clearly met.

The first requirement is similarly fulfilled. "[W]here, as here, sole appellate jurisdiction lies in this Court, application for a common law writ in aid of appellate jurisdiction must be to this Court." *United States Alkali Export Ass'n v. United States*, 325 U.S. 196, 202 (1945). "Each of the prior cases in which this Court has invoked § 1651 to issue a writ 'in aid of [its jurisdiction]' has involved a particular lawsuit over which the Court would have statutory review jurisdiction at a later stage."

Chandler v. Judicial Council of the Tenth Circuit of the United States, 398 U.S. 74, 112–13 (1970) (Harlan, J., concurring). Assuming that Martinez-Villareal is permitted to litigate another federal habeas corpus petition, there can be no question that this Court would possess "statutory review jurisdiction at a later stage" of the proceedings.

Finally, and closely related to the other factors (especially in the circumstances of this case) is the requirement that there be a showing of such "exceptional circumstances" as warrant the exercise of this Court's discretion. If no review is granted here, a single court of appeals panel will have succeeded in rewriting the Act and injecting additional proceedings and delay into capital habeas proceedings, despite recognition by all members of this Court that the Act's purpose is to expedite resolution, and *restrict* the grounds for relief, especially in successive petitions. See *Felker v. Turpin*, 116 S. Ct. at 2340 ("The Act . . . further restricts the availability of relief to habeas petitioners;" "The added restrictions which the Act places on second habeas petitions . . ."); *Lindh v. Murphy* (61 Crim. L. Rep. at 2178—Chs. 153 and 154 both "revise standards of proof and persuasion in a way favorable to a state," in addition to procedural changes; p.2179 and n.7—Congressional intent was to give states advantages, especially in "expediting capital habeas cases"). Indeed, the court of appeals' bizarre resolution of the issue not only permits, but explicitly requires, multiple habeas petitions, the first of which will *necessarily* be partially frivolous, as well as multiple warrants of execution, the first of which will never be allowed to be carried out:

> Under our holding, a competency claim *must be raised* in a first habeas petition, whereupon *it also must be dismissed* as premature due to the automatic stay that issues when a first petition is filed. Once the state issues a second warrant of execution and the state considers the now-ripe competency claim, a federal court may hear that claim—and only that claim—because it was originally dismissed as premature and therefore falls outside of the rubric of "second or successive" petitions.

(App. A, Slip Op. at 13–14, emphasis added.) And all of this mischief will occur in proceedings in which the State lacks any meaningful remedy, if no relief is provided by means of this Court's extraordinary writ authority. Presumably the nonavailability of "statutory" certiorari, which is assumed by this argument, will be just as true in any future cases where resistance to the filing of a successive petition containing a competency for execution claim is attempted, and the State's right not to have to litigate successive petitions which should have been precluded under a correct application of the Act will, of course, have been irretrievably lost before the matter ever arrives in this Court for review on the merits.

That a writ should be granted in these circumstances is shown by *De Beers Consol. Mines v. United States*, 325 U.S. 212 (1945). A district court, at the time of the filing of the complaint, had granted an injunction restraining the corporate antitrust defendants from transferring or disposing of any of their property within the United States until completion of the case. There could be no statutory certiorari review of the injunction, because the Expediting Act precluded review of interlocutory orders in antitrust cases, but this Court granted "common law certiorari" pursuant to § 262 of the Judicial Code, the predecessor to 28 U.S.C. § 1651(a):

> If the preliminary injunction here granted, unless set aside, will stand throughout the course of the trial and for an indefinite period after its termination, and if the order was beyond the powers conferred upon the court, it is plain, under the decisions mentioned, that the petitions present an appropriate case for the exercise of our jurisdiction under § 262. As hereafter noted the order in question was not made to grant interlocutory relief such as could be afforded by any final injunction, but is one respecting a matter lying wholly outside the issues in the case; no decision of the suit on the merits can redress any injury done by the order; and therefore unless it can be reviewed under § 262 it can never be corrected if beyond the power of the court below. When Congress withholds interlocutory reviews, § 262 can, of course, not be availed of to correct a mere error in the exercise of conceded judicial power. But when a court has no judicial power to do what it purports

> to do—when its action is not mere error but usurpation of power—the situation falls precisely within the allowable use of § 262.

325 U.S. at 217. The parallel to this case is clear: the order from the Ninth Circuit was not for relief such as would be granted at the conclusion of the case, but rather concerns a matter (interpretation of the Act's preclusion rules—a threshold determination, preliminary to litigation of the merits of the successive petition) that lies "wholly outside" the substantive issue (competency for execution); the statute purports to preclude review by certiorari; without review Petitioners will be forced to engage in litigation that ought not to occur under a correct understanding of the Act, so that "no decision on the merits" can redress that injury; "and therefore unless it can be reviewed under [§ 1651] it can never be corrected if beyond the power of the court below." Also analogous is *House v. Mayo*, 324 U.S. 42 (1945), a habeas corpus case where ordinary certiorari could not be used because no certificate of probable cause had been granted by either the district court or the court of appeals; therefore, "common law certiorari" pursuant to former § 262 was granted, to reverse the denial of the CPC and permit consideration of the merits of the habeas petition.

To grant an "extraordinary writ" in this case would be particularly appropriate in light of this Court's longstanding willingness to employ such a writ "where it was the only means of forestalling intrusion by the federal judiciary on a delicate area of federal-state relations, *State of Maryland v. Soper,* 270 U.S. 9, 46 S. Ct. 185, 70 L. Ed. 449 (1926)." *Will v. United States*, 389 U.S. 90, 95 (1967). In *Soper*, federal revenue agents were indicted on state charges of murder for a death that occurred during a raid, but obtained removal of the case to the federal district court. When the Maryland authorities moved to have the case remanded to the state courts, the district court denied the motion. This Court recognized that the effect of the removal was that "the jurisdiction of the courts of a state to try offenses against its own laws and in violation of its own peace and dignity is wrested from it by the order of an inferior federal court." 270 U.S. at 29. There was no ordinary mode of interlocutory review available, and an acquittal in the district court would, of course, mean an end of the case, preventing vindication of the state's

interests. *Id.* at 30. Therefore, to prevent improper intrusion by an inferior federal court into the criminal processes of a state (which is comparable to the intrusions that both this Court and Congress have recognized are visited upon the states through excessive habeas corpus proceedings), this Court granted mandamus and reversed the erroneous removal order. The continuing vitality of *Soper* is indicated by its citation in *Will v. United States*. Moreover, Chief Justice Rehnquist has noted (relying on these decisions) that in cases involving "the delicate area of federal-state relations," "mandamus must be more readily available [than] in other civil litigations." *Estelle v. Justice*, 426 U.S. 925, 930 (1976) (dissenting from denial of certiorari).

In sum, it appears that jurisdiction exists for this Court to review the Ninth Circuit's decision by means of ordinary "statutory" certiorari, despite the existence of the limitation on review included in the Act. If, however, the Court concludes that statutory certiorari is unavailable, it should nonetheless exercise its discretion to hear the case under whichever of the "extraordinary writs" authorized by 28 U.S.C. § 1651(a) is appropriate.

CONCLUSION

The Ninth Circuit not only is at variance with the Eleventh Circuit on major points of habeas corpus jurisprudence, but has usurped legislative authority by rewriting the 1996 Antiterrorism and Effective Death Penalty Act, even though that statute does not, in fact, contravene the Suspension Clause. The crux of the matter is that Martinez-Villareal is not constitutionally entitled to federal collateral review of his competency for execution claim, and has had ample opportunity for both state and federal review of that undeniably factual issue. Petitioners therefore respectfully urge this Court to grant certiorari, or whatever other form of writ is deemed appropriate, to obtain review of this case and decide the important matters it presents.

Respectfully submitted,

GRANT WOODS
Attorney General

PAUL J. McMURDIE
Chief Counsel

BRUCE M. FERG
Assistant Attorney General
(Counsel of Record)

Attorneys for PETITIONERS

[14353]

APPENDICES

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Jun 23, 1997
Cathy A. Catterson, Clerk
U.S. Court of Appeals

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAMON MARTINEZ-VILLAREAL, Petitioner, v. TERRY STEWART, Respondent.	)	No. 97-80229

Application for Order to File Successive Petition for
Writ of Habeas Corpus in the District Court
For the District of ArizonaArgues and Submitted June 9, 1997
San Francisco, California

RAMON MARTINEZ-VILLAREAL, Petitioner, v. TERRY STEWART, Respondent.	)	No. 97-80249 ORDER

Petition for Writ of Habeas Corpus

Submitted June 9, 1997
San Francisco, California

Before: D.W. NELSON, LEAVY, and T.G. NELSON, Circuit Judges

[Page 2] PER CURIAM:

Petitioner has moved for permission to file a successive habeas corpus petition in the district court pursuant to the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified in relevant part at 28 U.S.C. § 2244. We hold that § 2244's prohibition on second or successive petitions does not apply to a petition that raises only a competency to be executed claim under *Ford v. Wainwright*, 477 U.S. 399 (1986).

I.

Ramon Martinez-Villareal was convicted on two counts of first-degree murder and was sentenced to death. *See State v. Martinez-Villareal*, 702 P.2d 670 (Ariz. 1985). Martinez-Villareal filed a petition for habeas corpus in the federal district court on March 25, 1993. He asserted, inter alia, that he was not competent to be executed. The district court dismissed this claim without prejudice as premature[1] and granted the writ on other grounds. We reversed the district court's decision but explained that "[o]ur instruction to enter judgment denying the petition is not intended to affect any later litigation of [the competency to [Page 3] be executed] question." *Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1309 n.1 (9th Cir. 1996).

On remand to the district court, Martinez-Villareal moved the court to reopen the first habeas proceeding. Martinez-Villareal feared that the newly enacted AEDPA would foreclose review of

1. It was the State of Arizona that had suggested to the district court that Martinez-Villareal's competency claim was not ripe for adjudication. The State pressed the importance of having

> a single adjudication of competency, *at a time when all [of Martinez-Villareal's] other claims have been resolved and a warrant has been issued*, so that an execution actually is imminent within a reasonable period of time . . . . To do a competency determination now would be futile, because it will certainly have to be repeated when the time for execution finally arrives.

State of Arizona's Reply to Response to Motion for Summary Judgment, Dec. 17, 1993, at 45–46 (emphasis added).

his competency claim on a second petition despite the parties' and the court's intention to address the claim once a warrant of execution had issued. On March 24, 1997, the district court denied the motion and reassured Martinez-Villareal that it had "no intention of treating the 'incompetency to be executed' claim as a successive petition."

On May 16, 1997, despite this assurance, the district court recognized that "as a result of the AEDPA, it does not have jurisdiction to entertain" Martinez-Villareal's competency claim. The district court noted that "the AEDPA effectively deprives all federal district courts of jurisdiction to entertain second petitions raising Eighth Amendment 'competency to be executed' claims." On May 19, 1997, we stayed Martinez-Villareal's execution to consider whether this is indeed the case and, if so, whether it constitutes a suspension of the writ of habeas corpus.

II.

Ford v. Wainwright holds that the Eighth Amendment "prohibits a state from carrying out a sentence of death upon a prisoner who is insane." 477 U.S. at 409-10. However, the determination of whether an inmate is competent to be executed cannot be made before the execution is imminent, i.e., before the warrant of [Page 4] execution is issued by the state. *See Herrera v. Collins*, 506 U.S. 390, 406 (1993) ("[T]he issue of sanity is properly considered in proximity to the execution.").

When Martinez-Villareal first raised his competency claim in federal court, the State of Arizona had not yet issued a warrant of execution. Thus, although we disposed of every other claim raised by Martinez- Villareal in his first habeas petition, we declined to address his competency claim because it was premature. *See Martinez-Villareal*, 80 F.3d at 1309 n.1.

Even if the State had issued its warrant of execution prior to our consideration of Martinez-Villareal's first habeas petition, his competency claim still would have been premature. In *Lonchar v. Thomas*, 116 S. Ct. 1293, 1297 (1996), the Supreme Court instructed that "if the district court cannot dismiss the [first habeas] petition on the merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the

case from becoming moot." Once this stay has been issued, the execution is not imminent, and the competency claim becomes premature. Accordingly, a competency claim cannot be asserted in a first habeas petition.

Under the AEDPA, such a claim cannot be asserted in a second petition either. Section 2244 of the AEDPA divides the world of second or successive petitions into two categories: Those that raise claims that were presented in a previous petition, and those that raise claims that were not presented in a previous petition. A claim that was presented in a prior petition must be dismissed. 28 U.S.C. § 2244(b)(1). This sanction applies to a competency [Page 5] claim raised in a first petition even though that claim can never be adjudicated because it will always be premature. Accordingly, a petitioner must reserve his colorable competency claim and present it as a new claim in a second petition. But a claim that was not presented in a prior petition must be dismissed unless

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2).

The gateway described in subsection (A) does not apply to a competency claim because the constitutional right upon which such a claim is based was announced in 1986. The gateway described in subsection (B) does not apply because competency to be executed is not an issue of guilt or innocence. *See Greenawalt v.*

Stewart, 105 F.3d 1268, 1277 (9th Cir.) ("[T]he new 28 U.S.C. § 2244(b)(2)(B) forecloses all successive-petition review of constitutional claims unrelated to guilt or innocence."), *cert. denied*, 117 S. Ct. 794 (1997). It thus appears that the automatic stay accompanying a first habeas petition and the inapplicable gateways provided by the AEDPA foreclose any federal review of a death row inmate's competency to be executed. [Page 6]

III.

We are asked to decide whether this predicament constitutes an unconstitutional suspension of the writ of habeas corpus. The Suspension Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const., Art. I, § 9, cl. 2.[2] Martinez- Villareal has demonstrated that a district court will never be able to hear his (or anybody's) competency to be executed claim. Whether this amounts to an unconstitutional suspension of the writ depends upon whether *any* federal court is authorized to entertain Martinez-Villareal's competency claim.

We already have noted how the new statute precludes a federal district court from hearing a colorable competency claim on either a first or second petition. Thus, whether the writ has been suspended depends on whether or not the Supreme Court may entertain a colorable competency claim in the exercise of its jurisdiction to hear original habeas applications.[3] [Page 7]

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2. The State correctly observes that the writ known to the Framers "was quite different from that which exists today." *Felker v. Turpin*, 116 S. Ct. 2333, 2339 (1996). But like the Supreme Court, we assume that "the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789." *Id.* at 2340.

3. We reject the suggestion that direct review by the Supreme Court of the state court's competency proceedings suffices to sustain § 2244 against constitutional attack. Certiorari review does not amount to an adequate alternative form of collateral relief, *see Swain v. Pressley*, 430 U.S. 372, 381 (1977), because it is not collateral review at all. We recognize that this conclusion directly contradicts the Eleventh Circuit's decision in *In re Medina*, 109 F.3d 1556, 1564 (11th Cir. 1997) ("review [of a competency claim] could

(continued...)

This question was not specifically answered in *Felker*. In *Felker*, the Court concluded that the "gatekeeping" system of the new Act, codified at 28 U.S.C. § 2244(b)(3), whereby a petitioner must obtain the permission of the court of appeals before filing a second or successive petition in the district court, "does not apply to our consideration of habeas petitions because it applies to applications 'filed in the district court.'" *Felker v. Turpin*, 116 S. Ct. 2333, 2339 (1996). But the Court did not decide the question of whether it was bound by the restrictions imposed by §§ 2244(b)(1) and (2)—the subsections that specifically foreclose consideration of Martinez-Villareal's competency claim.

The Court did, however, provide us with signposts suggesting its future response to this question. First, the Court noted that "[w]hether or not we are bound by these restrictions [of §§ 2244(b)(1) and (2)], they certainly inform our consideration of original habeas petitions." *Id.*

Second, the Court's reason for concluding that it is *not* bound by § 2244(b)(3) strongly suggests that it *is* bound by §§ 2244(b)(1) and (2). Section 2244(b)(3) discusses petitions that are filed "in the district court." The Supreme Court inferred that Congress therefore did not intend for that subsection to apply to petitions filed in the Supreme Court. Unlike § 2244(b)(3), §§ 2244(b)(1) and (2) do not contain limiting language and refer generally to all second or successive petitions. If § 2244(b)(3) does not apply to the Supreme Court because it is expressly limited to petitions filed in the district court, then [Page 8] §§ 2244(b)(1) and (2) should apply to the Supreme Court because they are not similarly limited.

Taken together, these signposts suggest that even the Supreme Court is bound by the new limitations on habeas review imposed by § 2244(b) and (2).[4] If we are correct, then a state prisoner's

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(...continued)
be sought through certiorari review of the state court competency proceedings").

4. We recognize that the Eleventh Circuit has reached the opposite result. We believe, however, that *In re Medina* is based upon a misreading of *Felker*. *Medina*'s conclusion that "the provisions of § 2244(b), as amended, do not restrict [the Supreme] Court's original habeas authority," 109 F.3d at 1564,

(continued...)

competency claim can never be heard by any federal court.

The constitutional problem with this preclusion is patent. Indeed, the Supreme Court upheld the AEDPA's gatekeeping provisions against attack under the Suspension Clause because such provisions were a "modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ.'" *Felker*, 116 S. Ct. at 2340. But the restrictions on successive petitions containing a colorable competency claim cannot be justified as a modified res judicata rule because res judicata cannot apply to a claim that will always be premature on a first petition.

We are left, then, with strong indications that under these narrow circumstances, the new statute poses a serious constitutional problem.[5] [Page 9]

IV.

We need not decide this difficult constitutional question because we conclude that Martinez-Villareal's competency claim does not fall within the rubric of § 2244. *See DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988) ("Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); *Tashima v. Administrative Office of the U.S. Courts*, 967 F.2d 1264, 1268 (9th Cir. 1992).

(...continued)
ignores both the Court's statement that it is at least "informed" by §§ 2244(b)(1) and (2), as well as the literal distinction between § 2244(b)(3) and §§ 2244(b)(1) and (2).

5. *Greenawalt* did not resolve the constitutional question with which we are faced. The *Greenawalt* court rejected the petitioner's claim that § 2244 "forecloses all successive-petition review of constitutional claims unrelated to guilt or innocence." 105 F.3d at 1277; *see also Medina*, 109 F.3d at 1565 (stating that the "plain terms" of § 2244(b)(2)(B) make it clear that "it has no application to claims that relate only to the sentence"). However, Greenawalt's sentencing claim was the type of claim that could be raised and addressed in a first petition. As we have explained, Martinez-Villareal's competency claim will never be addressed on its merits in a first petition.

In *In re Turner*, we concluded that "section 2244 does not apply to second or subsequent habeas petitions where the first petition was dismissed without prejudice for failure to exhaust state remedies." 101 F.3d 1323, 1323 (9th Cir. 1996). The Second Circuit arrived at the same conclusion in *Camarano v. Irvin*, 98 F.3d 44 (2d Cir. 1996). The *Camarano* court confronted the question of "whether a habeas petition qualifies as a 'second or successive' application within the meaning of § 2244, where it is filed after a prior petition is dismissed without prejudice for failure to exhaust state remedies." *Camarano*, 98 F.3d at 46. The court concluded that "because application of the gatekeeping provisions [of § 2244] to deny a resubmitted petition in cases such as this would effectively preclude any federal habeas review . . . . a dismissal without prejudice can have no preclusive [Page 10] effect on subsequent petitions." *Id.* at 46–47; *see also Christy v. Horn*, ___ F.3d ___ (3d Cir., June 5, 1997).

Turner and *Camarano* are founded upon exhaustion principles. Where a state prisoner has failed to exhaust state remedies, the federal habeas court may not grant his petition. 28 U.S.C. § 2254(b)(1). This rule obtains even where a habeas application contains both exhausted and unexhausted claims. *See Rose v. Lundy*, 455 U.S. 509, 522 (1982) ("A district court must dismiss habeas petitions containing both unexhausted and exhausted claims."). Where *Rose* applies, a petitioner must return to state court and litigate the unexhausted claims before presenting those claims in a new habeas petition to the federal court.

Rose aims to "protect the state court's role in the enforcement of federal law and prevent disruption of state judicial proceedings." *Rose*, 455 U.S. at 518. But *Rose* also ensures that a petitioner's federal claims, once exhausted, will be subject to federal review by demanding that a petition containing both exhausted and unexhausted claims be dismissed in its entirety.[6]

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6. The *Rose* Court could have permitted a federal court to dismiss only a petitioner's unexhausted claims and entertain the exhausted ones on the merits. But the abuse of the writ doctrine probably would have precluded federal review of the remaining claims once those claims had been exhausted in state court and raised in a second petition. The *Rose* Court avoided this result by requiring
(continued...)

Turner and *Camarano* sustained the viability of this scheme by ensuring that once all claims had been properly exhausted in the state courts, the state prisoner would still be able to raise his federal claims in a federal forum. To accomplish this result, [Page 11] both courts held that the new statute's reference to "second or successive petition" does not encompass petitions that are filed after original applications were dismissed in their entirety for failure to exhaust state remedies.

We are faced with a different situation. *Rose* did not require the dismissal of Martinez-Villareal's first petition in its entirety because we determined that his competency claim was premature, rather than unexhausted. Unlike the cases of *Turner* and *Camarano*, we now address a situation in which there has been a federal decision on all but one of Martinez-Villareal's constitutional claims.

We conclude, however, that the rationale underlying *Turner* applies with equal force to Martinez-Villareal's competency claim. Just as we must dismiss petitions containing unexhausted claims, we must dismiss a competency claim raised in a first petition because it will always be premature. Just as we dismiss unexhausted claims to permit state courts to pass first judgment on those claims, we dismiss a competency claim so that the state court may have the first opportunity to consider that claim once a warrant of execution has issued. And just as we permit an exhausted petition to be heard in federal court even after it had been dismissed previously as unexhausted, so too should we permit a ripe competency claim to be heard in federal court even after it had been dismissed previously as premature. *Turner* reached this result to ensure that a petitioner's federal claims are accorded one hearing in federal court. We now extend *Turner* to competency claims that previously were dismissed without prejudice as [Page 12] premature in order to ensure that such claims are likewise subject to federal review.

We believe that this result is justified by the fact that the normal procedural path contemplated by *Rose* and protected by

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(...continued)
dismissal of a mixed petition in its entirety.

Turner does not permit a federal court to consider a petitioner's competency claim. Let us suppose that we had dismissed Martinez-Villareal's first petition in its entirety pursuant to *Rose*. Let us also suppose that the State then issued a warrant of execution, thereby enabling Martinez-Villareal to exhaust his competency claim in state court. Finally, let us suppose that upon exhaustion of this claim, Martinez-Villareal brought a consolidated habeas petition to the federal courts containing all of his constitutional complaints, including his competency claim.

Under the rationale of *Rose* and the holding of *Turner*, we would construe this application as if it were Martinez-Villareal's first habeas petition. We would therefore be required to issue a stay of execution so that the federal court could entertain (for the first time) his constitutional claims. The federal stay of execution, of course, would render his once-ripe competency claim premature, even though it has been exhausted in the state court. Thus, while this petition may be heard under *Rose* and *Turner*, the competency claim cannot be addressed until a second warrant of execution issues, the state court once again determines that the petitioner is competent, and the claim reappears before a federal court. Of course, at this point the federal court is precluded from reviewing the competency claim if it is deemed a "second or successive" petition barred by § 2244(b). [Page 13]

As the foregoing analysis indicates, application of *Rose* to a petition that includes a competency claim does not afford any opportunity for federal review. Moreover, to dismiss an entire first petition on the basis of an unexhausted competency claim ultimately will violate one of the animating purposes behind *Rose* and modern habeas jurisprudence. Under *Rose*, the state court must have the first opportunity to consider Martinez-Villareal's competency claim. But the state court's judgment will always be discarded as moot once the exhausted petition reaches the federal court and the mandatory stay issues. As a result, the state will always be required to begin again with the competency claim once the exhausted petition is adjudicated by the federal court, the premature competency claim is sent back to the state, and a new warrant of execution has issued. To say the least, this neither "protect[s] the state court's role in the enforcement of federal law," nor "prevent[s] disruption of state judicial proceedings."

Rose, 455 U.S. at 518.

We believe that our extension of *Turner* to a competency claim that was originally dismissed without prejudice as premature avoids both a probable constitutional problem and unwarranted disrespect of state judicial proceedings. Under our holding, a competency claim must be raised in a fiirst habeas petition, whereupon it also must be dismissed as premature due to the automatic stay that issues when a first petition is filed. Once the state issues a second warrant of execution and the state court considers the now-ripe competency claim, a federal court may hear that claim—and only that claim—because it was originally [Page 14] dismissed as premature and therefore falls outside of the rubric of "second or successive" petitions.[7]

Our holding is a narrow one that is inherently limited by the unique nature of a competency claim. Indeed, we can think of no other situation where a first petition meets *Rose*'s exhaustion requirement but a claim raised by that petition must be tabled as premature. We extend *Turner* to this circumstance, and this circumstance only.

V.

Martinez-Villareal's competency claim is not subject to the restrictions imposed by § 2244(b). Therefore we dismiss as unnecessary Martinez- Villareal's motion for authorization to file a petition for writ of habeas corpus in the district court. We transfer the petition presented to Judge D.W. Nelson on May 30,

7. Indeed, we question whether the successive petition and abuse of the writ doctrines even apply to competency claims. As the Seventh Circuit recently noted, "[s]ection 2244(b) uses, but does not define, the phrase 'second or successive habeas corpus application.'" *Benton v. Washington*, 106 F.3d 162, 163 (7th Cir. 1996). Due to its exceptional procedural posture, a petition raising only a competency claim might not be covered by this phrase. *See Fearance v. Scott*, 56 F.3d 633, 640 (5th Cir. 1995) ("Because *Ford* claims . . . concern the petitioner's immediate mental state, neither this court nor the Supreme Court has definitively decided whether relief would appropriately be denied on either abuse of the writ or successive petition grounds."); *Barnard v. Collins*, 13 F.3d 871, 878 (5th Cir. 1994) ("[O]ur research indicates no reported decision in which a federal circuit court or the Supreme Court has denied relief of a petitioner's competency-to-be-executed claim on grounds of abuse of the writ.").

1997 (Docket No. 97-80249), to the district court pursuant to 28 U.S.C. § 2241(b).[8] [Page 15]

8. Henceforth, a state prisoner in Martinez-Villareal's situation—that is, one who seeks to file a petition that contains *only* a competency to be executed claim where such a claim previously had been dismissed as premature—may file such a petition directly with the district court.

FILED
June 23, 1997
Cathy A. Catterson, Clerk
U.S. Court of Appeals

Judge T.G. Nelson, specially concurring:

In my view, the 1996 Act unconstitutionally suspends the writ of habeas corpus as to competency to be executed claims. It does so in an unambiguous fashion, by prohibiting the consideration of claims in second or successive petitions that do not fit the exceptions found in § 2244(b)(1) and (2). As we point out in the order, Martinez-Villareal's competency to be executed claim cannot come within the statutory exceptions.

In *Turner*, we "looked through" a prior petition that had been dismissed without action. Since the earlier petition had no practical or legal effect, it was appropriate to simply ignore it. By contrast, the petition which was the subject of our prior opinion was perhaps Martinez-Villareal's third try at getting into federal court, and was extensively litigated by the parties, to the point of denial of *certiorari* by the Supreme Court. 80 F.3d 1301 (9th Cir.), *cert. denied*, 117 S. Ct. 588 (1996). Thus, I don't believe *Turner* justifies our ignoring several years of litigation in the federal courts.

The law as it existed prior to the Act gave state prisoners the *opportunity* to present all their federal claims in federal court. They could lose the opportunity if they neglected to include a claim in a first petition. However, "old" § 2244(b) allowed the consideration of successive petitions containing "new grounds," if the "ends of justice" would be served. This opportunity was eliminated by the 1996 amendments to § 2244. [Page 2]

As we noted in our prior opinion, a petitioner could come to federal court with a procedurally defaulted claim if the petitioner can show cause for the procedural default and actual prejudice as a result of the alleged violations of federal law." 80 F.3d at 1305. A showing of cause required the petitioner to demonstrate the existence of an objective factor external to the defense which hampered efforts to comply with the procedural rule. *Id.* (citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). The lack of

ripeness of a claim of incompetence to be executed would appear to be a classic case of an external impediment to presentation of the claim.

Thus, on April 23, 1996, a claim involving lack of competency to be executed could be considered in a successive petition filed in federal court. On April 24, 1996, and since, under the clear terms of § 2244, such claims simply cannot be considered by any federal court, in spite of the fact that there was no earlier opportunity to do so. If the writ has not been suspended as to those claims, it is difficult to see how it can ever be suspended as to any class of claims.

My conclusion that the writ has been suspended as to claims such as Martinez-Villareal's would require an analysis of the appropriate remedy to ensure that Martinez-Villareal could get to federal court. The remedy we order, the transfer to the district court of the petition filed here, is an appropriate one, and I fully concur in the result.

13–4021. Competency to be executed; definition

A. A person who is sentenced to death shall not be executed as long as he is mentally incompetent to be executed.

B. As used in this article, "mentally incompetent to be executed" means that due to a mental disease or defect a person who is sentenced to death is presently unaware that he is to be punished for the crime of murder or that he is unaware that the impending punishment for that crime is death.

13–4022. Determining competency

A. If after a sentence of death is imposed the director of the state department of corrections, the prisoner's attorney or an attorney for the state has good reason to believe that the prisoner may be mentally incompetent to be executed, the director, the prisoner's attorney or an attorney for the state may file a motion in the superior court in the county in which the prisoner is located setting forth the facts relating to the prisoner's conviction and sentence and the facts giving rise to the belief that the prisoner may be mentally incompetent to be executed and requesting the court to order that the prisoner be examined for mental competency to be executed.

B. A stay of execution may not be granted by the superior court on the filing of a motion for examination of competency. If a stay is desired before the superior court rules on the motion, an application for a stay shall be submitted to the supreme court.

C. On receipt of a motion for examination of competency, the superior court shall determine if the motion is timely and presents reasonable grounds for the requested examination. If the motion is timely and presents reasonable grounds for the requested examination, the court shall appoint experts pursuant to the Arizona rules of criminal procedure. The appointed experts shall make copies of their reports available to all of the parties. The parties shall also disclose to the appointed experts and to each other the names and addresses of any other previously undisclosed mental health experts who have examined the prisoner and the results of the examinations.

D. After the examinations are completed, the court shall conduct a hearing to determine the prisoner's competency to be executed. At the hearing, all the parties may present evidence, cross-examine witnesses and present argument or by stipulation may submit the matter for the court's determination on the basis of the experts' reports.

E. Prisoners who are sentenced to death are presumed competent to be executed. A prisoner may be found incompetent to be executed only on clear and convincing evidence of incompetency.

F. The superior court shall specifically state its findings on the record. If the court finds that the prisoner is competent, the director of the state department of corrections shall execute the judgment as specified in the warrant. If the court finds that the prisoner is incompetent, the court shall suspend the execution and shall immediately transmit a copy of its order to the supreme court. The prisoner shall remain in the custody of the state department of corrections until the time for review has expired or a supreme court review is completed. If no review is sought or the supreme court upholds the finding of incompetency to be executed, the director of the state department of corrections shall deliver the prisoner to the state hospital. The prisoner shall remain confined at the state hospital until the prisoner becomes competent to be executed.

G. Within five days after the superior court grants or denies the motion for examination or rules on that motion, a person may file with the supreme court a petition for special action of the superior court's decision to grant or deny an examination for competency or order determining the prisoner's competency to be executed.

H. If a hearing to determine competency is held, the clerk of the court shall prepare a statement of the costs incurred by the county on the hearing. The judge shall certify the statement and shall forward it to the governor for approval. After approval, the governor shall order that the costs be paid to the county treasurer in the county in which the hearing was held from monies appropriated to the state department of corrections.

13–4023. Recovery of competency

A. Sixty days after a prisoner is committed to the state hospital, the chief medical officer of the state hospital shall file with the superior court a report setting forth the treatment being provided, the status of the prisoner and the prognosis as to when the prisoner will be competent. The chief medical officer shall provide copies of the report to all of the parties. The chief medical officer shall update the report every sixty days until the prisoner is deemed competent to be executed.

B. After a prisoner recovers competency to be executed, the chief medical officer of the state hospital shall return the prisoner to the state department of corrections and shall certify to the supreme court that the prisoner is competent. The supreme court shall order that the execution be conducted according to the original warrant, if unexpired, or shall issue a new warrant appointing a time for execution on the judgment.

13–4024. Late or successive motions

A. A motion for an examination under section 13–4022 that is filed fewer than forty-five days before a scheduled execution is deemed late and shall not be considered by the court unless it is accompanied by both of the following:

1. At least one affidavit from a licensed physician or licensed psychologist who has examined the prisoner that states the physician's or psychologist's opinion that the prisoner is not competent to be executed.

2. A statement that establishes good cause for the failure to file the motion in a timely manner.

B. If a motion for an examination under section 13–4022 has been denied, if a hearing has been held or if a certificate has been issued by the chief medical officer of the state hospital, no further hearings on competency may be granted unless the successive motion is accompanied by an affidavit that shows a substantial change of circumstances since the previous determination of competency was made and the showing is sufficient to raise a significant question about the prisoner's competency to be executed.